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IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1990

THE STATE OF COLORADO,
Petitioner,
vs.
PHILIP LESLIE GALIMANIS,
Respondent.

PETITION FOR WRIT OF CERTIORARI

On Certiorari to the Colorado Court of Appeals
Court of Appeals No. 84CA0809

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QUESTIONS PRESENTED FOR REVIEW

1. Whether *Wainwright v. Greenfield*, 474 U.S. 284 (1985), allows use of a defendant's request for counsel to rebut evidence offered in support of an insanity defense?

2. Whether mention of a defendant's invocation of silence in the sanity portion of a bifurcated proceeding constituted harmless error where the prosecution made no reference to this invocation in closing argument, where there was other substantial evidence of sanity, and where the invocation could not be used to establish guilt?

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED FOR REVIEW i

OPINION BELOW 1

JURISDICTION 2

CONSTITUTIONAL PROVISIONS 3

FACTUAL BACKGROUND 4

STATE COURT PROCEEDINGS 6

REASONS FOR GRANTING THE WRIT .. 8

A. A DEFENDANT'S REQUEST FOR COUNSEL IS ADMISSIBLE TO REBUT EVIDENCE OF INSANITY. 9

B. THE BIFURCATED NATURE OF THE PROCEEDINGS RENDERED HARMLESS REFERENCES TO DEFENDANT'S SILENCE. 12

CONCLUSION 15

APPENDIX A 17

APPENDIX B 33

PAGE

APPENDIX C 37

APPENDIX D 39

APPENDIX E 41

APPENDIX F 47

APPENDIX G 51

APPENDIX H 53

TABLE OF AUTHORITIES

CASES **PAGE**

Commonwealth v. Hunsberger, 523 Pa. 92, 565 A.2d 152 (1989), *cert. denied*, 107 L. Ed. 2d 1030 (1990) 9, 11, 12, 15

Doyle v. Ohio, 426 U.S. 610 (1976) 10, 11, 14

Greenfield v. Wainwright, 741 F.2d 329, 330-331 (11th Cir. 1984) 11

Miranda v. Arizona, 384 U.S. 436 (1966) 9, 12

New York v. Quarles, 467 U.S. 649 (1984) 12

Nichols v. Wainwright, 783 F.2d 1540, 1543, n.2 at 1543 (11th Cir. 1986) 11

People v. Galimanis, 765 P.2d 644 (Colo. App. 1988) 1-3, 9-11, 13-15

Trujillo v. People, 150 Colo. 235, 372 P.2d 86 (1962) 14

Wainwright v. Greenfield, 474 U.S. 284 (1985) . . . . . i, 3, 8-15

STATUTES **PAGE**

28 U.S.C. Section 1257 (1988) 3

Ariz. Rev. Stat. Ann. § 13-3988 (1988) 9

Ark. Stat. Ann. § 16-86-101 (1987) 9

Cal. Penal Code § 1026 (West, 1978) 9

Colo. Rev. Stat. § 16-8-104 (1986) 1, 9

D.C. Code Ann. § 22-2401 (1981) 9

Ga. Code Ann. § 17-7-130 (Miche, 1987) 9

Mass. Const. PT,I Art. XII (1978) 9

Me. Rev. Stat. Ann. tit. 17, § 40 (1978) 9

N.H. Rev. Stat. Ann. § 628.2 (1984) 9

N.J. Stat. Ann. § 2C:4-1 (1978) 9

Ohio Rev. Code Ann. § 2903.01 (1990) 9

S.D. Codified Laws Ann. § 23A-10 (Rule 12.2) (1988) 9

Tex. Code Crim. Proc. Ann. art. 26.13 (Vernon 1989) 9

Wis. Stat. § 971.14 (1982) 9

RULES **PAGE**

Sup. Ct. R. 17.1(b) and (c) 3

OTHER AUTHORITIES **PAGE**

Amendment V of the United States Constitution 3

Amendment VI of the United States Constitution 3

Amendment XIV, Section 1 of the United States Constitution 3

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OPINION BELOW

The Colorado Court of Appeals reversed a jury determination which found respondent Galimanis sane at the time he beat, stabbed, and decapitated Cynthia McQueen on the night of April 19-20, 1983. This opinion, attached as Appendix A, is published as *People v. Galimanis*, 765 P.2d 644 (Colo. App. 1988). It represents a decision by two members of a three judge panel, and it overturned the sanity portion of a bifurcated proceeding.[1]

[1]Colo. Rev. Stat. § 16-8-104 (1986) provides as follows:

Separate trial of issues: The issues

It upheld the guilt-innocence portion in which respondent was convicted of first degree murder but left the validity of this conviction contingent upon the outcome of a new sanity proceeding. One dissenting judge would have upheld both of these proceedings. *Galimanis, supra,* Metzger, J. concurring and dissenting.

Petitioner then sought certiorari from the Colorado Supreme Court, and certiorari was granted in July, 1989 (*see* Amended Order of Court attached as Appendix B). However, after receiving briefs and hearing oral argument, the Colorado Supreme Court declined to issue an opinion. Instead, on February 19, 1991, it denied certiorari as having been improvidently granted (*see* Order of Court attached as Appendix C). Petitioner timely sought rehearing in the Colorado Supreme Court and rehearing was denied on March 11, 1991 (*see* Appendix D).

JURISDICTION

In this first degree murder case, the Colorado Court of Appeals overturned a sanity determination because the trial court allowed the prosecution "to present evidence at (the) sanity trial that (respondent) had asserted his constitutional rights after being given a Miranda advisement". *Galimanis, supra,* at 647. The Colorado Court of Appeals did not rely on any independent state ground for its decision. Rather, it based its ruling on this court's decision

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> raised by the plea of not guilty by reason of insanity shall be tried separately to different juries, and the sanity of the defendant shall be tried first.

in *Wainwright v. Greenfield,* 474 U.S. 284 (1985), and held that *Greenfield* "mandates reversal of (respondent's) sanity adjudication." *Galimanis, supra,* at 647.

Because *Greenfield* is based upon an interpretation of the due process clause of the Fourteenth Amendment, certiorari jurisdiction is invoked pursuant to 28 U.S.C. Section 1257 (1988). Moreover, the Colorado Court of Appeals has decided a federal question in a way that conflicts with the decision of another state court of last resort, and its decision involves an important question of federal law which has not been, but should be, decided by this court. Thus, certiorari jurisdiction is also invoked pursuant to Sup. Ct. R. 10.1(b) and (c).

CONSTITUTIONAL PROVISIONS

Amendment V of the United States Constitution provides in pertinent part: "No person ... shall be compelled, in any criminal case, to be a witness against himself...."

Amendment VI of the United States Constitution provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right ... to have the assistance of counsel for his defense."

Amendment XIV, Section 1 of the United States Constitution provides in pertinent part: "No state shall ... deprive any person of life, liberty, or property without due process of law...."

FACTUAL BACKGROUND

In April of 1983, Cynthia McQueen was a 23 year old mother of two small children. At this time, Cynthia and her two children lived in an apartment in Wheat Ridge, Colorado. Respondent lived in an adjoining apartment. On the evening of April 19, 1983, Cynthia intended to end her relationship with respondent. An altercation occurred in Cynthia's apartment. Respondent subsequently beat Cynthia about the face and stabbed her at least five times before decapitating her with a knife. Cynthia was alive but unconscious when respondent began the process of removing her head. This decapitation took a significant amount of time less than hours but more than a few minutes. It required a manipulation of the head and cervical spine to expose the soft disks which separate the bony vertebrae. Respondent even left "hesitation" marks on one of the vertebral bodies in an apparent attempt to find soft tissues in the vertebral column. Respondent left the knife in the victim's back. His palm print was later found on the knife-handle. Respondent left the corpse and its severed head to be discovered by Cynthia's children.

Respondent's Plymouth Volare was inoperable at this time. However, respondent was seen hurriedly rummaging through the trunk of this vehicle before he later fled in the victim's Ford Maverick. Some 29 hours later, a woman in Denver, Colorado saw respondent sleeping in the Ford Maverick outside her home. She called Denver police. Because the police had previously been informed of Ms. McQueen's murder, they approached respondent with caution in believing that he could be armed and dangerous. The officers drew their weapons, knocked on the car windows, and told respondent to unlock the door. He complied and when officers asked his name, he responded

appropriately.

An officer named Al Keiser then told respondent that he was being arrested for investigation of homicide. Respondent laughed and stated that nobody had anything on him. Officer Keiser then advised respondent of his Miranda rights. Respondent acknowledged that he understood these rights, and Keiser then asked him if he had a gun on his person or in the car. Respondent said that he didn't have a gun and that he wanted to talk to a lawyer.

At this time, respondent wore dark blue jeans with large blood stains. However, there was no blood on his shirt. His hands had been washed since the killing and his dress was appropriate for the outdoor temperature. He was able to recognize media personnel and he ducked down and asked the officers to prohibit picture-taking. He also expressed concern for the victim's car.

Respondent was subsequently transported to the Wheat Ridge Police Department and then to the Jefferson County Jail. Eight different officers had contact with respondent during this time when certain physical evidence was taken from his person and various booking procedures were performed. These officers would later attest to his ability to converse and understand directions.

At the Wheat Ridge police station, Mr. Galimanis was advised of his Miranda rights a second time by Detective David Light. This detective then asked respondent "if he wanted to talk or if he wanted to have a lawyer present." Mr. Galimanis responded by stating: "No, I don't want to talk to you. I want a lawyer." Pertinent portions of the testimony of Officer Keiser and Detective Light at the sanity proceeding are attached as Appendices E and F.

STATE COURT PROCEEDINGS

In raising an insanity defense to a first-degree murder charge, Mr. Galimanis indicated that he would be relying heavily on lay testimony of his actions, words, and conduct as proof of insanity. On August 2, 10, and 12, 1983, he filed witness lists indicating that he would be presenting extensive evidence of his demeanor, including a description of his behavior while in police custody on a previous arrest. Included on these witness lists were six persons including his sister, all of whom would testify regarding his demeanor during the months preceding his murder of Cynthia McQueen. A state patrolman was also included on this witness list. This officer would later testify to respondent's behavior after an arrest for drunk-driving on March 4, 1983, approximately 6 weeks before the murder of Cynthia McQueen.

On August 15, 1983, the prosecution filed a motion to allow testimony describing defendant's assertions of his Miranda rights. In resolving respondent's opposition to this motion, the district court held as follows:

> [i]n a sanity trial all actions, words, conduct of the defendant are certainly relevant to the determination of the jury of sanity or insanity at the time of the events and I think whatever inferences the jury wishes to draw from his statements at the time he was arrested are certainly proper, and therefore, that motion of the prosecution is granted.

The sanity trial then began on August 22, 1983. Respondent called several lay witnesses who described his conduct, actions, and words prior to the murder of Ms.

McQueen. Respondent also elicited how a deputy sheriff called by the prosecution noted "suicidal ideation" on a written form completed a few hours after respondent's arrest and how this same officer recommended counseling for him. Respondent also called three psychiatrists and three psychologists in support of his insanity claim. During extensive cross-examination of two such experts, there was brief reference to respondent's general assertion of rights and to his specific request for a lawyer. Some of the lengthy expert testimony described respondent as a borderline personality who experienced psychotic episodes. Defendant's psychosis was described as "intermittent" or "transient," by some experts and as "latent" by another.

In responding to this claim, the prosecution presented lay testimony of respondent's behavior before the killing. The prosecution also presented the testimony of no less than eight peace officers to establish that defendant's conduct was normal or coherent subsequent to his arrest. The great majority of this testimony involved questions and answers concerning defendant's general ability to understand and follow directions and to converse in a coherent manner. Officer Keiser briefly described how Mr. Galimanis requested a lawyer when he was asked if he had a weapon (*see* Appendix E). Detective Light briefly described how he asked respondent if he wanted to speak or if he wanted a lawyer and how Mr. Galimanis replied by saying that he didn't want to talk and that he wanted a lawyer (*see* Appendix F).

The prosecution also called a psychiatrist, Dr. Wahl, who opined that Mr. Galimanis was sane at the time of the murder. Dr. Wahl testified that respondent's claimed psychosis would not have prevented him from distinguishing right from wrong through the stimulus of his assault on the victim, and the difficult and meticulous decapitation of Ms. McQueen. He also testified that respondent's actions

immediately after the killing, particularly his flight in the victim's car, showed that Mr. Galimanis recognized the wrongfulness of the murder. Dr. Wahl also stated that respondent's request for an attorney when arrested evidenced awareness and control over what he said (*see* Appendix G). Without any prompting from the prosecution, this witness also incorrectly mentioned how respondent had no comment or said "nothing" after his arrest. (*Id.*) In fact, respondent did speak at this time; his remarks concerned media coverage, and the fate of the victim's car (*see* Appendix E).

In closing argument, the prosecution made a single reference to respondent's request for a lawyer, but no references to any invocation of silence (*see* Appendix H). The jury found defendant sane at the time of the killing and an entirely separate jury found him guilty of first-degree murder. The Colorado Court of Appeals overturned the first of these two verdicts.

REASONS FOR GRANTING THE WRIT

The Colorado Court of Appeals decision presents the perfect opportunity for this Court to address an issue which was left unresolved in *Wainwright v. Greenfield*, 474 U.S. 284 (1985), and which is critical to fair and reliable adjudications of claimed defenses of insanity. That issue concerns the prosecution's use of evidence of a defendant's assertion of his right to counsel to determine a later claim of insanity.

The opportunity exists largely because, unlike in

Greenfield, in Colorado (as well as in 13 other states[2]), the issue of one's sanity is determined in a proceeding bifurcated from trial on the issue of one's guilt or innocence -- a fact which greatly diminishes the potential harm connected with any additional reference to the defendant's assertion of his right to remain silent.

A. A DEFENDANT'S REQUEST FOR COUNSEL IS ADMISSIBLE TO REBUT EVIDENCE OF INSANITY.

In *Greenfield,* this court ruled that, because silence should carry no penalty, an accused's assertion of Miranda rights[3] should not be used to rebut a claim of insanity. However, in a concurring opinion, the present Chief Justice drew an important distinction between the right to remain silent and the right to counsel where the issue is sanity, not guilt or innocence. *Greenfield, supra*, Rehnquist J. concurring at 297-299. The Supreme Court of Pennsylvania recognized this distinction. *Commonwealth v. Hunsberger*, 523 Pa. 92, 565 A.2d 152 (1989), *cert. denied*, 107 L. Ed. 2d 1030 (1990). The *Galimanis* court did not.

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[2]Thirteen states and the District of Columbia provide for bifurcated sanity proceedings: Ariz. Rev. Stat. Ann. § 13-3988 (1988); Ark. Stat. Ann. § 16-86-101 (1987); Cal. Penal Code § 1026 (West, 1978); Colo. Rev. Stat. § 16-8-104 (1986); D.C. Code Ann. § 22-2401 (1981); Ga. Code Ann. § 17-7-130 (Miche, 1987); Me. Rev. Stat. Ann. tit. 17, § 40 (1978); Mass. Const. PT,I Art. XII (1978); N.J. Stat. Ann. § 2C:4-1 (1978); N.H. Rev. Stat. Ann. § 628.2 (1984); Ohio Rev. Code Ann. § 2903.01 (1990); S.D. Codified Laws Ann. § 23A-10 (Rule 12.2) (1988); Tex. Code Crim. Proc. Ann. art. 26.13 (Vernon 1989); Wis. Stat. § 971.14 (1982). The State of Florida provided unitary proceedings at the time of trial in *Greenfield.* Thus, the same jury decided both the sanity and guilt/innocence issues in the *Greenfield* case.

[3]See *Miranda v. Arizona*, 384 U.S. 436 (1966).

Galimanis incorrectly bars prosecutors from using relevant evidence, that is, a request for counsel, to rebut demeanor evidence of insanity. Unlike an invocation of silence, a request for counsel "may be highly relevant where the plea is based on insanity". *Greenfield, supra,* Rehnquist, J. concurring at 297. Moreover, unlike *Greenfield*, this case did not involve a prosecutor's comment upon an accused's silence. *See Greenfield, supra,* n.2 at 287. Rather, it only involved a prosecutorial comment upon the exercise of the right to counsel (see Appendix H). Thus, the opinion below incorrectly expands this court's decision in *Greenfield.* It held that *Greenfield* prohibits any use of a defendant's request for counsel, see *Galimanis, supra,* at 648, despite the fact that the constitutional basis for the Greenfield decision is the implicit promise that an accused's *silence* will not be used against him in any proceeding. *See, e.g., Greenfield, supra,* at 290; *Doyle v. Ohio*, 426 U.S. 610 (1976). In this manner, the *Galimanis* opinion places a restriction upon the prosecution which is not warranted by the constitutional analysis used by this court in *Greenfield*, and this restriction precludes the use of evidence which would be highly relevant to rebut claims that an accused's demeanor manifested insanity. *See Greenfield,* Rehnquist, J. concurring.

This case is distinguished from *Greenfield* not only by the bifurcated nature of the trial court proceedings but also by the extent to which respondent Galimanis relied upon demeanor evidence to establish his insanity. Here, respondent endorsed at least six witnesses for the obvious purpose of establishing that his demeanor evidenced insanity. Here, the trial court found that the relevancy of such demeanor evidence -- that is, all actions, words, and conduct -- would allow the prosecution to use respondent's request for counsel and assertion of silence. In contrast, *Greenfield* evidences little or no reliance on demeanor

evidence by the defense. *See Greenfield v. Wainwright*, 741 F.2d 329, 330-331, 334 (11th Cir. 1984). Accordingly, the *Galimanis* opinion erroneously allows defendants to present extensive evidence of unusual actions, words or conduct in support of an insanity plea while denying the prosecution use of what may be the best available evidence to prove an accused's abilities to distinguish right from wrong. *See Greenfield*, Rehnquist J., concurring. *See also Nichols v. Wainwright*, 783 F.2d 1540, 1543, n.2 at 1543 (11th Cir. 1986). (*Greenfield* inapplicable where behavior around time of arrest is presented in support of a defense).[4]

In contrast, the Supreme Court of Pennsylvania recognized that statements concerning the right to counsel may be admitted to rebut a claim of insanity. *Hunsberger*, *supra*. In so doing, the Pennsylvania court properly recognized that *Greenfield*, and *Doyle, supra* preclude an accused's silence from being used against him but that statements concerning his right to counsel may be used to counter an insanity defense. *See Greenfield*, Rehnquist J., concurring.

Here, respondent's statement to Officer Keiser was a request for counsel, not an assertion of the right to remain silent. Moreover, Keiser did not elicit this request through any effort to inquire about the killing of Cynthia McQueen. Rather, he asked Mr. Galimanis if he had a

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[4]The majority in *Greenfield*, suggested that prosecutors use "carefully framed questions" which circumvent the substance of an accused's invocation of silence. *See Greenfield, supra*, at p. 295. However such questioning will not adequately rebut extensive demeanor evidence such as that presented by respondent particularly since he also presented expert testimony that his psychosis was "transient" or "temporary." Accordingly, states should be allowed to rebut allegations that an accused's demeanor evidenced insanity with direct evidence of his statements regarding the right to counsel. *Greenfield, supra*, Rehnquist, J., concurring, *Hunsberger, supra*.

gun, and Galimanis responded that he had no gun and wanted a lawyer. Admission of this invocation of the right to counsel, not silence, did not violate respondent's constitutional rights, particularly given the intention he demonstrated prior to trial to rely on his demeanor as probative of insanity. *See Greenfield,* Rehnquist J. concurring, *Hunsberger, supra.* Indeed, this request for counsel was a spontaneous and unelicited remark which followed a non-investigative question posed to promote safety, not to gather evidence. Such questions and the responses thereto are outside the purview of *Miranda, supra*. See *New York v. Quarles, 467 U.S. 649 (1984)*. In any event, there is surely no implicit promise that a request for counsel made in response to an officer's inquiry about a firearm will not be admitted against the accused in any proceeding. *See Greenfield,* Rehnquist, J. concurring; *Quarles, supra*. Thus, use of respondent's request for counsel and comment thereon did not violate the constitutional interests protected by *Greenfield*.

B. THE BIFURCATED NATURE OF THE PROCEEDINGS RENDERED HARMLESS REFERENCES TO DEFENDANT'S SILENCE.

This case also presents the novel question of whether the due process interests recognized by *Greenfield* apply to the sanity portion of a bifurcated proceeding in which the trier of fact cannot use silence in a manner prejudicial to the accused. In other words, it involves the unanswered question of whether use of an accused's silence in such a proceeding is necessarily harmless because silence, by virtue of its insoluble ambiguity, will have little on no probative value to the issue of sanity. *See Greenfield,* Rehnquist J. concurring at 297.

Admittedly, Detective Light and Dr. Wahl not only referred to requests for counsel, but also to assertions of the right to silence by Mr. Galimanis. Dr. Wahl's references to respondent's silence were not even elicited by the prosecution and they incorrectly suggested that respondent was silent at the time of arrest when in fact he spoke about media coverage and the victim's car (see Appendices E, G, and H). More importantly, unlike *Greenfield*, this case did not involve prosecutorial comment upon an accused's silence or a jury that determined both guilt and sanity. Rather, it involved a bifurcation of the sanity and guilt proceedings and substantial demeanor evidence of sanity which supported a harmless error claim not made by the state in *Greenfield*. Indeed, this case involved evidence of respondent's actions during and after the victim's death which belied the notion that he was experiencing a psychotic episode during the murder. *Galimanis,* Metzger, J., concurring and dissenting. Similarly, it involved testimony by several police officers that respondent's behavior was normal after his arrest. *Id.* Accordingly, the brief mention of respondent's silence by Light and Wahl before a jury that would not decide guilt was harmless beyond a reasonable doubt given the "insolubly ambiguous" inferences which can be drawn from a defendant saying nothing. *See Greenfield,* Rehnquist J., concurring at 297, 301.

Here, the bifurcation of the guilt and sanity proceedings minimized the prejudice of the brief references to defendant's silence because such silence had minimal probative value to the issue of sanity. Here, Mr. Galimanis' undisputed conduct after stabbing his victim further removed this case from the purview of *Greenfield*, where the prosecution did not raise harmless error. *See Galimanis,* Metzger J., concurring and dissenting at 649-650. In this case, the "meticulous and painstaking decapitation,"

the washing of hands, the donning of a bloodless shirt, the flight in the victim's car, the subsequent concern for this car, the recognition of media personnel, the recognition of a particular police officer, and the ability to understand police directions precluded reversal due to references to silence or to requests for counsel. *Id.; see also Greenfield,* Rehnquist, J., concurring at 301 (brevity of remark reduces prejudice). While respondent's assertion of silence was improperly admitted, the prosecution never argued that this particular assertion was proof of sanity and the Colorado Court of Appeals' refusal to find such error harmless in a bifurcated proceeding stemmed from its "overly mechanistic" application of this court's opinion in *Greenfield. See Galimanis,* Metzger, J., concurring and dissenting at 650.

The bifurcation of guilt and sanity trials protects the accused from prejudice likely to arise in the minds of jurors exposed to the wide variety of evidence which might be admissible on the issue of insanity but which would not be admissible upon the trial of a not guilty plea. *E.g., Trujillo v. People*, 150 Colo. 235, 372 P.2d 86 (1962). Accordingly, the due process concerns which mandated reversal in *Greenfield* should not apply here. This court has deemed silence to be "insolubly ambiguous". *Doyle, supra. Greenfield,* Rehnquist, J., concurring at 297. Thus, the use of silence in a proceeding where guilt is not at issue is of such little consequence that this court should not view such use as an inherently prejudicial violation of the implicit promise that silence will carry no penalty. *See Greenfield,* at 290-291.

Moreover, reversals of sanity proceedings such as the one involved here discourage the use of bifurcated proceedings in which states attempt to safeguard the due process rights of defendants through complete separation of evidence of sanity and evidence of guilt. Accordingly, this court should consider whether the due process concerns of

Greenfield are fully served if state appellate courts decline to recognize how the bifurcation of guilt and sanity proceedings minimizes any prejudice resulting from a *Greenfield* violation. *See Galimanis*, Metzger, J. concurring and dissenting at 640. In any event, this case is readily distinguishable from *Greenfield* by the lack of comment on the exercise of silence, the bifurcation of the proceedings and the substantial evidence that respondent was not psychotic either at the time of the killing or the time of his arrest. *Galimanis*, Metzger, J. concurring and dissenting. Accordingly, any error relating to either silence or request for counsel was harmless beyond a reasonable doubt. *Id.*

CONCLUSION

This case presents an important constitutional question concerning the ability of states to rebut insanity defenses with requests for counsel which prove an accused's cognitive abilities and disprove claims of confusion, incoherence or mental imbalance. *See Greenfield,* Rehnquist J., concurring at 297. This case also illustrates the confusion and conflict relating to the use of statements concerning counsel particularly given this court's denial of certiorari in *Hunsberger*. Accordingly, this case affords an opportunity to develop the law regarding what statements of an accused may be used to rebut demeanor evidence supporting an insanity claim. Similarly, this case will permit this court to consider the due process interests of *Greenfield* in the context of bifurcated proceedings which necessarily minimize the prejudice of a *Greenfield* violation while advancing the due process rights of defendants.

Respectfully submitted,

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APPENDIX A

The PEOPLE of the State of Colorado,
Plaintiff-Appellee,

Philip Leslie GALIMANIS,
Defendant-Appellant.

No. 84CA0809.

Colorado Court of Appeals,
Div. I.

Sept. 22, 1988.
Rehearing Denied Nov. 25, 1988.
Certiorari Pending Jan. 25,1989.

Defendant was convicted in the District Court of Jefferson County, Ruthanne N. Polidori, J., of first-degree murder, motor vehicle theft, and violent crime. Defendant appealed. The Court of Appeals, Pierce, J., held that: (1) trial court did not abuse its discretion in allowing substitution of psychiatrist by ex parte order; (2) psychiatrist's questioning of defendant could continue beyond his expressed reluctance to discuss particular topic without violating defendant's constitutional or statutory privilege against self-incrimination; (3) prosecution should not have been permitted to present evidence at sanity trial that defendant asserted his constitutional rights after being given *Miranda* warnings; and (4) defendant's mother should have been permitted to render opinion regarding defendant's "state of mind" or "mental status" during time prior to murder that he lived with her.

Affirmed in part, reversed and remanded in part. Metzger, J., concurred in part, dissented in part, and filed opinion.

1. Criminal Law -- 633(1)

Ex parte order substituting one courtappointed psychiatrist for another in murder prosecution did not affect defendant's substantial rights, even though hearing on substitution was not held until approximately nine days after substitution was made; defendant was afforded ample opportunity at hearing to present evidence concerning substitution, and nothing in record indicated that he was prejudiced by substitution, although better practice was to afford both parties opportunity to present evidence regarding good cause necessary for substitution before it was made. C.R.S. 16-8-106(1); Rules Crim.Proc., Rule 52(a).

2. Criminal Law -- 633(1)

Trial court did not abuse its discretion in finding that good cause existed for substitution of one court-appointed psychiatrist for another in murder prosecution; conflict in original psychiatrist's schedule and defendant's uncooperative behavior necessitated substitution, and there was no indication that second psychiatrist was unqualified. C.R.S. 16-8-106(1).

3. Criminal Law -- 641.3(11)

Ex parte order substituting one courtappointed psychiatrist for another in murder prosecution did not deny defendant his constitutional right to counsel during course of examination because defendant had no such right. U.S.C.A. Const.Amend. 6.

4. Criminal Law -- 438(6)

Probative value of photographs and videotapes of scene of murder victim's decapitation did not outweigh their probative value as to defendant's ability to deliberate.

5. Criminal Law -- 393(1)

Although murder defendant had statutory privilege against self-incrimination during course of court-ordered psychiatric examination, no *Miranda* warning was required because examination did not implicate defendant's rights under Fifth Amendment. U.S.C.A. Const.Amend. 5; C.R.S. 16-8-106(2).

6. Criminal Law -- 393(1)

Even if murder defendant had right to terminate court-ordered psychiatric examination, there was insufficient showing in record that he in fact exercised such prerogative such that his statutory privilege against self-incrimination was violated when psychiatrist continued questioning; although defendant expressed some initial reluctance to discuss certain topics during examination, defendant described events in detail when psychiatrist returned to topic later in examination. C.R.S. 16-8-106(2).

7. Criminal Law -- 393(1)

Because issue of murder defendant's sanity was separate proceeding before jury that could not consider issue of guilt, there was no implication of defendant's privilege against self-incrimination when court-appointed psychiatrist continued questioning after defendant expressed reluctance to discuss certain topics. U.S.C.A. Const. Amend. 5.

8. Criminal Law -- 486(6)

Testimony of psychiatrist who had examined murder defendant pursuant to court order was properly admitted

during guilt trial to rebut defendant's defense of impaired mental condition. C.R.S. 16-8107.

9. Criminal Law -- 393(1)

Court-appointed psychiatrist may lawfully pursue questions designed to elicit responses helpful in arriving at opinion regarding sanity, and such questioning may continue beyond defendant's expressed reluctance to discuss particular topic without violating his constitutional or statutory privilege against self-incrimination. U.S. C.A. Const.Amend. 5; C.R.S. 16-8-106(2).

10. Criminal Law -- 407(1)

Prosecution should not have been permitted to present evidence at sanity trial that murder defendant had asserted his constitutional rights after being given his *Miranda* warnings. U.S.C.A. Const. Amend. 14.

11. Criminal Law -- 1166(12)

Erroneous admission of evidence at murder defendant's sanity trial that he had asserted his constitutional rights after being given *Miranda* warnings constituted reversible error inasmuch as there was considerable testimony offered to show that defendant was insane and evidence was admitted solely for purpose of attempting to show defendant's rationality shortly after his apprehension. U.S.C.A. Const. Amend. 14.

12. Criminal Law -- 452(2)

Murder defendant's mother should have been permitted to render opinion regarding his "state of mind" or "mental status" during time that he lived with her, which ended three months before murder was committed, notwithstanding that mother was not qualified as expert. C.R.S. 168-109.

Duane Woodard, Atty. Gen., Charles B. Howe, Chief Deputy Atty. Gen., Richard H. Forman, Sol. Gen., Robert M. Petrusak, Asst. Atty. Gen., Denver, for plaintiff-appellee.

David F. Vela, State Public Defender, Michael J. Heher, Deputy State Public Defender, Denver, for defendant-appellant.

PIERCE, Judge. Defendant, Philip Leslie Galimanis, appeals the trial court judgment entered upon jury verdicts finding him guilty of first degree murder, motor vehicle theft, and violent crime. We affirm in part and reverse in part. The operative facts of this case are not in dispute. In April 1983, the victim was found dead on the floor of her apartment. She had been beaten, stabbed, and decapitated. Police discovered that the victim's car had been taken from the apartment complex and was still missing. Nearly twenty-nine hours later, police located the automobile and discovered defendant inside, asleep. When awakened, he was somewhat incoherent and disoriented. Defendant was then arrested and later charged.

In June 1983, defendant entered a plea of not guilty by reason of insanity. Pursuant to § 16-8-104, C.R.S. (1986 Repl. Vol. 8A), a sanity trial was held, and the jury found that defendant was sane. Subsequently, defendant was tried and convicted of the substantive crimes by a different jury.

I.

Defendant asserts that the trial court abused its discretion in allowing a substitution of psychiatrists by an *ex parte* order. We find no abuse.

Section 16-8-106(1), C.R.S. (1986 Repl. Vol. 8A) provides that:

> "For good cause shown, upon motion of the prosecution or defendant, or upon the court's own motion, the court may order such further or other examination . . . as is advisable under the circumstances."

The purpose behind this section is to cause the trial court, in the exercise of judicial discretion, to decide whether good cause has been shown or exists for the appointment of additional experts. *Massey v. District Court,* 180 Colo. 359, 506 P.2d 128 (1973).

[1] Therefore, in order to effectuate the purpose behind this section, we conclude that it is a better practice to afford both parties the opportunity to present evidence regarding the good cause necessary for a substitution of experts before the substitution is made.

The record here shows that a hearing on the substitution issue was held approximately nine days after the substitution was made. Nevertheless, at the hearing, defendant was afforded ample opportunity to present evidence concerning the substitution issue. Also, nothing in the record indicates that he was prejudiced in any way by the *ex parte* substitution. Accordingly, the order did not affect his substantial rights. *See* Crim.P. 52(a).

[2] We also reject defendant's assertion that the trial court abused its discretion in finding that good cause existed for the substitution of psychiatrists. The record shows that a conflict arose in the original psychiatrist's schedule, and, because of that conflict and the uncoopera-

tive behavior of the defendant, it became necessary to substitute psychiatrists. The record contains no evidence that the subsequent mental examiner was unqualified. Under these circumstances, we conclude that the trial court's finding of good cause was not an abuse of discretion. *See Garza v. People,* 200 Colo. 62, 612 P.2d 85 (1980).

[3] Finally, we reject defendant's contention that the *ex parte* order denied him his constitutional right to counsel during the course of the examination. Defendant has no such right. *See United States v. Cohen,* 530 F.2d 43 (5th Cir.1976), *cert. denied,* 429 U.S. 855, 97 S.Ct. 149, 50 L.Ed. 2d 130 (1976).

II.

[4] We also find unpersuasive defendant's contention that certain photographs and video tapes admitted into evidence were unduly prejudicial. Although we agree that the evidence reflects a shocking decapitation scene, the evidence was relevant and probative of the defendant's ability to deliberate. Our review of the record leads us to conclude that the evidence was not so unduly prejudicial as to outweigh its probative value. *See People v. Avery,* 736 P.2d 1233 (Colo.App.1986); *see also* CRE 403.

III.

[5-9] Defendant also argues that the trial court erred in failing to exclude the entire testimony of the prosecution's psychiatrist at both the sanity trial and the trial on the merits. Defendant maintains that the psychiatrist improperly continued questioning him after he had expressed some reluctance to discuss particular topics,

thereby asserting his *Miranda* rights. We disagree.

A court-ordered psychiatric examination does not implicate defendant's rights under the Fifth Amendment. *United States v. Byers,* 740 F.2d 1104 (D.C.Cir.1984). Although defendant has the privilege against self-incrimination during the course of the examination pursuant to §16-8-106(2), C.R.S. (1986 Repl. Vol. 8A), no *Miranda* type warning is required. A lengthy personal interview is one of the few effective means of ascertaining sanity. See *United States v. Albright,* 388 F.2d 719 (4th Cir. 1968). Indeed, it would be nearly impossible to evaluate a person's sanity without making inquiry. *See Thornton v. Corcoran,* 407 F.2d 695 (D.C.Cir.1969).

Even if we assume that defendant had the right to terminate the psychiatric examination, there is insufficient showing in the record that he exercised such a prerogative. He expressed some initial reluctance to discuss certain topics during the course of the examination. However, when the psychiatrist returned to the topic later in the examination, defendant described the events in detail. There is nothing in the record to show that his comments were coerced or involuntary in any way, or that his responses were the result of surreptitious mental invasion. *See Early v. Tinsley,* 286 F.2d 1 (lOth Cir.1960), *cert. denied,* 365 U.S. 830, 81 S.Ct. 717, 5 L.Ed.2d 708 (1961).

Moreover, because the sanity issue is a separate proceeding before a jury that cannot consider the issue of guilt, there is no implication of a defendant's privilege against self-incrimination. *Lewis v. Thulemeyer,* 189 Colo. 139, 538 P.2d 441(1975). Self-incrimination, by definition, applies to the admission of evidence to aid in establishing the guilt of the accused, not his sanity. *Lewis v. Thulemeyer,*

supra. Moreover, there is no evidence here that defendant was assured that these statements would not be used against him. *See Wainwright v. Greenfield,* 474 U.S. 284, 106 S.Ct. 634, 88 L.Ed.2d 623 (1985). Consequently, there is no merit to defendant's argument that the psychiatrist's testimony was improperly admitted at the sanity trial in violation of his privilege against self-incrimination.

We also reject defendant's contention that the psychiatrist's testimony was improperly admitted during the guilt trial to rebut defendant's defense of impaired mental condition. Admission of such evidence is expressly allowed for that purpose by statute, the validity of which is not contested here. §16-8-107, C.R.S. (1986 Repl. Vol. 8A).

Accordingly, we conclude that a psychiatrist may lawfully pursue questions designed to elicit responses helpful in arriving at an opinion regarding sanity. This questioning may continue beyond a defendant's expressed reluctance to discuss a particular topic without violating his constitutional or statutory privilege against self-incrimination. Therefore, we find no error in the trial court's admission of the psychiatrist's testimony during the guilt trial to rebut defendant's claim of impaired mental condition.

IV.

[10-11] Defendant also contends that the trial court erred in allowing the prosecution to present evidence at his sanity trial that he had asserted his constitutional rights after being given a *Miranda* advisement. We agree.

In *Wainwright v. Greenfield, supra,* the Supreme Court determined that admission of a defendant's post-advisement

statement asserting his *Miranda* rights violated his due process rights guaranteed by the Fourteenth Amendment. It held:

> "What is impermissible is the evidentiary use of an individual's exercise of his constitutional rights after the state's assurance that the invocation of those rights will not be penalized."

In the present case, after being given a *Miranda* advisement, defendant asserted his right to an attorney before questioning by police. This assertion was used by the People as probative of defendant's sanity at his sanity trial. Use of defendant's statements for these purposes was expressly rejected by the Supreme Court in *Wainwright v. Greenfield*, and therefore, that case mandates reversal of defendant's sanity adjudication.

We reject the prosecution's contention that, because the issue of sanity was conducted in a separate, bifurcated proceeding, the admission of this evidence was probative of defendant's sanity and was, therefore, not objectionable. Even though there was no separate sanity trial in *Wainwright v. Greenfield, supra*, its holding is premised upon the unfairness of admitting a defendant's statements after law enforcement officers have implicitly assured him that such evidence will not be used. The Court held that the unfairness is grounded in the due process clause of the Fourteenth Amendment, a right to which a criminal defendant is entitled even at a sanity trial. Therefore, defendant's statements invoking his right to counsel after his *Miranda* advisement may not be used.

We further reject the People's argument that admission

of defendant's statements was harmless beyond a reasonable doubt. The record shows that a motion *in limine* was filed by the prosecution for the sole purpose of admitting this evidence. There was considerable testimony offered to show that defendant was insane, and the statements in question were admitted solely for the purpose of attempting to show defendant's rationality shortly after his apprehension. Also, considering the prosecution's reliance upon the evidence throughout the proceedings, we conclude that the error was not harmless beyond a reasonable doubt. *See United States v. Remigio,* 767 F.2d 730 (10th Cir.1985), *cert. denied*, 474 U.S. 1009,106 S.Ct. 535, 88 L.Ed.2d 465 (1985).

V.

[12] While we do not rule on whether the error is reversible, because this matter will be retried and the issue will probably arise again, we also agree with defendant's contention that his mother was improperly excluded from rendering an opinion regarding his "state of mind" or "mental status" during the time that he lived with her which ended three months before this crime was committed.

Section 16-8-109, C.R.S. (1986 Repl. Vol. 8A) provides that:

> "In any trial or hearing in which the mental condition of the defendant is an issue, witnesses not specially trained in psychiatry or psychology may testify as to their observation of the defendant's actions and conduct, and as to conversations which they have had with him bearing on his mental condition, and they shall be permitted to give their opinions or conclusions concerning the mental condition of the defendant."

Defendant's mother testified at great length about the defendant's erratic behavior and the contacts that he had with various psychiatrists and mental institutions throughout his lifetime. In particular, she testified concerning his actions and life-style during the months which preceded his leaving her home in Chicago and moving to Denver, some three months before the incidents of April 1983. She was not asked to give her opinion as to his sanity or his state of mind at the time the crime was committed.

Nevertheless, the trial court would not allow her to render any opinion on the defendant's mental condition because she was not qualified as an expert, and because she had only one minimal contact with defendant in the three months immediately preceding the crime.

The first reason given for excluding the opinion is overcome by the language of § 16-8-109, C.R.S. (1986 Repl. Vol. 8A). The latter reason is not applicable because her minimal contact with defendant after he left home had no bearing on what she observed while he was still at home. The question asked of her pertained only to the four-month period during which he was at home. Accordingly, under the provisions of the statute, and the state of this record, she should have been allowed to render an opinion or conclusion concerning his mental condition during the time from September 1982 to January 3,1983, subject to a determination of relevancy.

VI.

Defendant also maintains that voir dire instructions regarding the fact that the prosecution would not be seeking the death penalty were improperly given. While

under the circumstances of this case these instructions did not amount to reversible error, on remand the trial court should refrain from such comment. *See People v. Hickam*, 684 P.2d 228 (Colo. 1984).

VII.

We have reviewed and considered the remainder of defendant's contentions regarding various evidentiary rulings by the trial court, and we find the rulings either not in error or not likely to occur on retrial.

Accordingly, the adjudication of sanity is reversed, and the cause is remanded with directions that the defendant be afforded a new sanity trial. In the event defendant is found to have been sane at the time of the offense, then the judgments of conviction stand affirmed. If defendant is found to have been insane at the time of the offense, then the judgments of conviction will be vacated.

CRISWELL, J., concurs.

METZGER, J., concurs in part, and dissents in part.

METZGER, Judge, concurring in part and dissenting in part.

I respectfully dissent from Part IV of the majority opinion which holds that the admission of defendant's post-advisement assertions of his *Miranda* rights at the sanity trial was reversible error. I believe that any error relating to the use of these assertions was harmless beyond a reasonable doubt and, thus, does not constitute a basis to reverse the defendant's conviction.

If there is overwhelming support in the record for a jury's verdict, error in the admission of other cumulative evidence is harmless beyond a reasonable doubt. *People v. Steele,* 193 Colo. 87, 563 P.2d 6 (1977). Further, errors of constitutional magnitude may properly be considered harmless if the evidence derived from the violation is cumulative of other evidence from which similar inferences may be drawn. *See People v. Madonna,* 651 P.2d 378 (Colo.1982); *People v. Roark,* 643 P.2d 756 (Colo.1982).

In this case, defendant did not deny having killed and decapitated the victim, and accordingly, the central issue for the jury's determination was defendant's state of mind at the time he did so. Defendant's sole assertion was that he killed the victim during a psychotic episode. He contended that he had suffered from these episodes intermittently for several years. Psychiatric testimony established that these episodes were transient and temporary.

The trial court determined that the defendant's behavior at the time of his arrest, twenty-nine hours after the victim's death, was relevant to a determination of his mental state at the time of the victim's death. While I do not necessarily agree with that ruling, since defendant's psychotic episodes were described as temporary and relatively brief, the evidence concerning defendant's sanity and rationality at his arrest is overwhelming.

Seven police officers testified that defendant behaved normally after his apprehension, and they described in detail his dress, his recognition of media personnel and his attempts to avoid them, his recognition of police officers he knew, his understanding of police instructions, and his concern about what would happen to the victim's car. These were not the words or actions of a man in the throes

of a psychotic episode.

Moreover, the evidence describing defendant's actions during and after the victim's death belies the notion that defendant was experiencing a psychotic episode. The medical experts testified that defendant had engaged in a lengthy struggle with the victim and that he had severely beaten her about the face and head. He then inflicted several stab wounds, to the jaw, chest, and back, including several "hesitation-type" punctures to her back. Finally, while the victim was still alive, defendant began a meticulous and painstaking decapitation, which took "a significant amount of time" --less than "hours" but more than a few minutes. Thereafter, he washed his hands, changed his shirt, rummaged through the trunk of his inoperable car, and fled in the victim's car. He conceded that he had the requisite state of mind--specific intent--to be guilty of aggravated motor vehicle theft by taking the victim's car.

Therefore, the passing references to defendant's invocation of his right to counsel were cumulative of other, more probative evidence establishing his sanity, and did not constitute a sufficiently significant portion of the evidence in the sanity trial to constitute reversible error.

Moreover, I find the majority's reliance on *Wainwright v. Greenfield,* 474 U.S. 284, 106 S.Ct. 634, 88 L.Ed.2d 623 (1986) to be overly mechanistic. In *Wainwright*, the evidence concerning the defendant's sanity and that concerning his guilt were inextricably interwoven in a single sanity/guilt trial. Thus, admission of his post-advisement statement may well have been prejudicial. Colorado's bifurcated sanity/guilt proceedings minimize the problem of this prejudice. More importantly, in *Wainwright v. Greenfield, supra*, the prosecution's failure to argue that admission of the

defendant's statements was harmless error constituted an essential basis for both the majority's holding and the special concurrence. Here, however, the People did so argue, and I agree that the error was harmless.

Consequently, I would not reverse defendant's sanity adjudication and conviction. As to Part V, I consider the error to be harmless and, thus, not a basis for reversal. I agree with the majority's disposition of the remaining issues in this case.

APPENDIX B

SUPREME COURT, STATE OF COLORADO
Case No. 885C624
Certiorari to the Colorado Court of Appeals 84CA0809
Jefferson County District Court 83CR364

AMENDED ORDER OF COURT (See Cross-Petition Issues 4 and 5)

THE PEOPLE OF THE STATE OF COLORADO,

Petitioner/Cross-Respondent,

v.

PHILIP LESLIE GALIMANIS,

Respondent/Cross-Petitioner.

Upon consideration of the Petition and Cross-Petition for Writ of Certiorari filed in the above cause, and now being sufficiently advised in the premises,

IT IS THIS DAY ORDERED that said Petition and Cross-Petition shall be, and the same hereby are, GRANTED as to the issues set forth below, and the briefs shall be filed as follows:

(a) Petitioner/Cross-Respondent's Opening Brief shall be filed within forty days from this date;
(b) Respondent/Cross-Petitioner's Combined Answer

and Opening Brief shall be filed within forty days from receipt of the Opening Brief;

(c) Petitioner/Cross-Respondent's Combined Answer and Reply Brief may be filed within thirty days from receipt of the Combined Answer and Opening Brief; and

(d) Respondent/Cross-Petitioner's Reply Brief may be filed within fourteen days from receipt of the Combined Answer and Reply Brief.

BY THE COURT, EN BANC, JULY 17, 1989.

The issues as announced by the Court this day are as follows:

Summary of issues presented in petition for certiorari:

Whether a majority of the court of appeals erred in holding that the admission at the defendant's sanity trial of his post-advisement assertions of his *Miranda* rights was reversible error.

Whether the use in the defendant's sanity trial of his post-advisement assertions of his *Miranda* rights was harmless error.

Whether the lay opinion of the defendant's mother regarding his sanity was properly excluded by the trial court.

Summary of issues presented in cross-petition for certiorari:

Whether the trial court's *ex parte* order for substitution of Dr. Wahl, a court-appointed psychiatrist, violated

defendant's rights to counsel and due process where defense counsel was not afforded an opportunity to object to the substitution, to prepare his client for the examination, or to be present during the examination.

Whether the admission at the defendant's sanity trial of Dr. Wahl's testimony violated the defendant's right to counsel, his privilege against self-incrimination, and his due process rights where Dr. Wahl had questioned the defendant without obtaining a waiver of his *Miranda* rights and continued questioning him even after the defendant expressed his unwillingness to discuss certain topics.

Whether the trial court erred in admitting evidence at the trial on the merits of the defendant's statements made to police officers after he had asserted his right to remain silent and right to counsel.

Whether the admission into evidence of the testimony of Dr. Heron, the court-appointed psychiatrist who performed the competency examination, violated the controlling statute and the defendant's rights to remain silent and to due process of law where that testimony included and was based on the defendant's numerous assertions of his right to remain silent, Dr. Heron ignored these assertions, the defendant was not advised of and did not waive his rights and of the consequences of making statements to Dr. Heron, and further, whether the statutory scheme of §§ 16-8-106(2) and -107, 8A C.R.S. (1986 & 1988 Supp.), violates the due process clauses and the fifth amendment and Colo. Const. art. II, § 18.

Whether the admission at the defendant's guilt trial of Dr. Wahl's testimony violated the defendant's right to counsel, his privilege against self-incrimination, and his due

process rights where Dr. Wahl had questioned the defendant without obtaining a waiver of his *Miranda* rights, and whether §§ 16-8-106(2) and -107, 8A C.R.S. (1986 & 1988 Supp.), are unconstitutional.

DENIED AS TO ALL OTHER ISSUES.

APPENDIX C

SUPREME COURT, STATE OF COLORADO
Case No. 88SC624
Certiorari to the Colorado Court of Appeals 84CA0809
Jefferson County District Court 83CR364

ORDER OF COURT

THE PEOPLE OF THE STATE OF COLORADO,

Petitioner/Cross-Respondent,

v.

PHILIP LESLIE GALIMANIS,

Respondent/Cross-Petitioner.

Upon consideration of the Record on Appeal, together with the written and oral arguments of counsel, and now being sufficiently advised in the premises,

IT IS THIS DAY ORDERED that said Petition and Cross-Petition for Writs of Certiorari shall be, and the same hereby are, DENIED as having been improvidently granted.

BY THE COURT, EN BANC, FEBRUARY 19, 1991.

APPENDIX D

SUPREME COURT, STATE OF COLORADO
CASE NO. 88SC624

CERTIORARI TO THE COLORADO COURT OF APPEALS, 84CA0809
JEFFERSON COUNTY DISTRICT COURT, #83CR364

ORDER OF COURT

THE PEOPLE OF THE STATE OF COLORADO,

Petitioner/Cross-Respondent,

vs.

PHILIP LESLIE GALIMAINIS,

Respondent/Cross-Petitioner.

Upon consideration of the Petition for Rehearing filed in the above cause, and now being sufficiently advised in the premises,

IT IS THIS DAY ORDERED that said Petition for Rehearing shall be, and the same hereby is, DENIED.

BY THE COURT, EN BANC, MARCH 11, 1991.
Chief Justice Rovira would grant.
Justice Lohr does not participate.

APPENDIX E

Pertinent Testimony of Officer Keiser.

Q Describe the behavior that you observed the defendant engage in during the time he was in your car. Tell us what he was doing.

When first got him into the car, was there any other persons there?

A At the time I got him in my car, I went around and got in my car, also. Another officer, Officer Rael from our department got in the back seat. At that time, I advised Mr. Galimanis of his constitutional rights. I advised him of his rights, asked if he understood. I asked him a second time if he understood his rights. He said -- he nodded the first time, said yes the second time that he understood his rights.

Q Okay. Did you tell him two separate times what his rights were, or did you tell him what his rights were, after each question he nodded, then you asked him for an affirmative answer or an answer verbally?

A When I read him his rights, each sentence of the rights I read or I told him, I asked him, do you understand.

Q Uh-huh.

A And he nodded and said yes.

Q Okay. Would you tell us essentially what the rights were that you advised the defendant of, at that time.

A I advised him that he had the right to remain silent. Anything he said can be and will be used against him in a court of law. He had the right to talk to a lawyer before questioning, have him present during questioning, and if he could not afford a lawyer, one will be appointed for him before questioning. He relayed to me that he did understand each right.

Q Okay. And which officer was present with you when you instructed the defendant regarding his rights?

A That was Officer Rael.

Q Now, after you asked if he understood and he answered you verbally, did you ask him any questions?

A The only question I asked Mr. Galimanis was what his name was and we had information at roll call that this party that was wanted was possibly armed with a gun or a weapon, specifically a gun. I asked him, at that time, if he had a gun or was his gun in the car. At that time, he said he had no gun; he wanted to talk to a lawyer.

I also asked him in the car -- the only other question was, I asked him his name, date of birth and the description of who he was for our contact information, like height, weight, eye, hair color.

Q While you were there, were there any members of the media around while you were still at the scene with the defendant in your car?

A Approximately five minutes after I got him in the patrol car, a Channel 4 News van showed up in front of the patrol car about, oh, 50, 75 feet, and started to set up his cameras.

Q Did you observe any reaction from the defendant in response to this news truck?

A As soon as this news truck came around the curve, Mr. Galimanis said, "Oh, shit."

Q And did he engage in any physical behavior, did he do anything physically that you observed, at that time?

A After that, a couple of other news vehicles came. I believe Channel 7 and Channel 9 were there. They got out their cameras. Mr. Galimanis told me, "Don't let them take pictures of me," and also ducked his head between his knees for as long as we were there and as long as the cameras were pointing at him.

Q Okay. And again, while you are still in the patrol car, did you observe or hear any particular statements or noises from the defendant?

A He would say something under his breath. I remember him saying, at one time, before we took him down, I think it was before the news truck came and after I told him he was under arrest for homicide, that nobody had anything on him and kind of chuckled. While he was in my patrol car, he mumbled some sentences under his breath and would kind of chuckle about what he said. I could not hear him and I did not pursue in seeing what he said, since I was instructed not to ask him any questions.

Q Okay. The mumbling that you talked about, did that appear to you to be in response to external happenings or things going on around the patrol car?

A Yes. He would see things or hear things and he would mumble something under his breath. It was sentences that he was not intending me to hear but was saying it out loud himself.

Q Okay. And as far as the sounds that you heard, were they totally incomprehensible sounds. Were they language that you recognized?

A They were in English. I could not hear them. He said them so softly. The only thing I did hear was they have nothing on me.

Q How long was the defendant in your patrol car?

A He was in my patrol car from the time we put him in to when we got him down to headquarters, approximately an hour, an hour and fifteen minutes, if not more.

Q Okay. And what took place at headquarters down in Denver?

A We took him downtown to headquarters. We proceeded up to the Homicide Detail where we put him in

a room and then after a few minutes, after everything was put together, statements, we then processed him through our jail, took him upstairs. We did not fingerprint him. We photographed him, but we did not fingerprint him. We wrapped his hands with lunch sacks to preserve any evidence that was on his hands, and at that time he was wondering why this was happening.

Q Okay. Did he ask you a specific question about that?

A He said why are you doing this.

Q And did you respond to him?

A We told him that we had to wrap his hands to preserve any evidence that he might have on his hands.

Q So all told, Officer Keiser, how long were you with the defendant on that morning of April 21?

A Approximately two-and-a-half to three hours.

Q And during that time, did the defendant walk appropriately? Was he able to control his movements and walk?

MR. GARLIN: Objection. It's an improper form. She can ask him what he observed.

THE COURT: It is a leading question. I will sustain the objection.

Q (By Ms. Malatesta) All right. Sir, did you notice anything about the way the defendant walked?

A He walked normally and did not require any assistance.

Q Did you notice anything about the way the defendant was dressed?

A He was dressed with blue jeans and, I believe, a jean-type jacket.

Q Okay. What was the weather like in terms of his dress?

A It wasn't cold, but it was raining. If you were outside, you'd have to have a raincoat, but other than that,

it wasn't very cold.

Q How would you characterize the way that he spoke with you in responding to your questions?

A Like I said before, I didn't ask him too many questions. The only questions I did ask him was his name, if he understood his rights, his description. I asked him where he lived and he responded without any hesitation and told me.

Q Okay. Could you understand his responses?

A Yes, ma'am, I could.

Q And on the times that you asked him things, did he appear to acknowledge your question, would he answer it or not?

A Yes, ma'am, he did.

Q Okay. Did he seem to you to know where he was?

A He never told me specifically that he was in a patrol car or with the police, but he knew that we were -- he asked me where we were going to take him and I told him to our police headquarters.

Q Okay. And did he follow instructions when requested by you?

A Completely.

Q Okay. Did he request anything of you regarding the vehicle that he was found in?

A Before we left, we had the vehicle -- after we pulled Mr. Galimanis out of the vehicle, we locked and shut all the doors before we left. He made a statement of "What are you going to do with the car?"

APPENDIX F

Pertinent Testimony of Detective Light.

Q Okay. Tell us how you went through the advisement form.

A Well, I stated to him, you are advised that you are now being interviewed regarding a first degree murder. Before we ask you any questions, you must understand your rights. Number one, you have the right to remain silent. At that time, I would ask him, do you understand this?

Q What did he say?

A He replied yes.

Q He did reply at those points?

A Yes.

Q All right. Were his eyes open?

A No.

Q Would his demeanor change?

A No.

Q Would his posture change?

A No.

Q Okay. Go ahead.

A And number two, anything you say can and will be used against you in court, in the event a case is filed. Do you understand this?

Q And?

A His reply was yes.

Q Did anything change about him?

A No.

Q Okay.

A You have the right to talk to a lawyer for advice before we ask you any questions and to have him present with you during questioning. Do you understand this? Yes.

Number four. If you cannot afford a lawyer,

one will be appointed for you before any questioning, if you wish. Do you understand this? His reply was yes.

Q All right.

A Number five. If you decide to answer questions now without a lawyer present, you will still have the right to stop answering at any time. You also have the right to stop answering at any time until you talk to a lawyer. Do you understand this? His answer, again, was yes.

Q All right. Again, throughout the five questions you asked him, the five times you paused for an answer, did the defendant ever change his posture, open his eyes?

A No. He remained seated with his chair tipped back, head against the wall, eyes closed.

Q He would answer you from that posture?

A Yes.

Q Was there any hesitation in his answers?

A No.

Q Okay. After you got finished with that, what did you do?

A I then asked him, at that time, if he wanted to talk to us about this or if he wanted to have a lawyer present.

Q And what did he say?

A He stated no, I don't want to talk to you. I want a lawyer.

Q Okay. Again, the same response from the same posture?

A Yes.

Q All right. How long did this process take up to this point?

A My total contact with him, or just --

Q From the time you first started with him in the little room to the time you just end with him right now.

A Maybe ten minutes.

Q Okay. When he said that, what did you do?

A That he wanted a lawyer?

Q Uh-huh.

A I told him that we wouldn't question him anymore. That was the end of it.

Q Did he say anything further?

A No.

APPENDIX G

Pertinent Testimony of Dr. Wahl.

Q ....Did you have the opportunity to review reports compiled by both police officers from the Denver Police Department, as well as police officers from the Wheat Ridge Police Department pertaining to the defendant's arrest on April 21?

A Yes

Q And were you aware of the defendant's request for a lawyer upon his arrest, as well as his general appearance and demeanor, at that time?

A It's my understanding that the only thing that he said to the police when he was arrested, that he has no comment, that he wants an attorney.

Q Okay.

A I am aware that he was in clothing which was bloodstained. I was aware that he was sleeping in the car in a residential block in the Denver area.

Q And again, do those facts have any particular significance to you in your determination of legal insanity regarding this man?

A It suggests, again, that when he was arrested, he had an idea of what he was being arrested for. He had very clear control over what he said, because he said nothing. He was aware of legal proceedings and had the wherewithal to request an attorney before he said anything.

APPENDIX H

Pertinent Argument of Prosecutor

He also says what are you going to do with the car, a passing thought, a logical thought, a rational thought. And most telling, ladies and gentlemen, is when asked after being advised of his rights and acknowledging them, understanding them, he says quite clearly I want a lawyer. He knows that he is in trouble. He knows he has an awareness, that he was acting wrongfully. Now, looking at that, and then, again, he says the same thing when he is talking to the Wheat Ridge Police Department upon another advisement of rights, you can tell the way the man's mind is operating.

CERTIFICATE OF MAILING

I, Gale A. Norton, a member of the bar of this court, herewith certify that the within PETITION FOR WRIT OF CERTIORARI has been deposited in the United States Mail, first-class postage prepaid, addressed to Mr. Joseph Spaniol, Jr., Clerk of the Court, Supreme Court of the United States, Washington, D.C. 20593 and that to my knowledge the mailing took place on April 30, 1991, within the permitted time for filing the brief.

GALE A. NORTON
Attorney General

Subscribed and sworn to before me in the County of _____, State of Colorado, this _____ day of _____, 1991.

_____
NOTARY PUBLIC

My Commission expires:

_____

CERTIFICATE OF SERVICE

This is to certify that I have duly served the within PETITION FOR WRIT OF CERTIORARI upon all parties herein by depositing copies of same in the United States mail, postage prepaid, at Denver, Colorado this 30th day of April, 1991, addressed as follows:

Michael Heher
Deputy State Public Defender
110 Sixteenth Street, Suite 800
Denver, Colorado 80202